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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

11 | RHONDA WILKERSON, CASE NO. CV-F-05-0583 LJW

12 Plaintiff,  
13 vs.

**ORDER ON DEFENDANT'S MOTIONS TO  
DISMISS AND TO STRIKE  
(Docs. 8 and 9.)**

14 ROBERT BUTLER,

Defendant.

## **INTRODUCTION**<sup>1</sup>

18 In this medical malpractice action, defendant Robert J. Butler, M.D. (“Dr. Butler”), seeks to  
19 dismiss the complaint of pro se plaintiff Rhonda Wilkerson (“Ms. Wilkerson”) on grounds of lack of  
20 this Court’s subject matter jurisdiction and to strike causes of action from the complaint. Ms. Wilkerson  
21 filed no opposition papers to Dr. Butler’s motions. This Court considered Dr. Butler’s F.R.Civ.P.  
22 12(b)(1) motion to dismiss and F.R.Civ.P. 12(f) motion to strike on the record and without the July 8,  
23 2005 hearing, pursuant to this Court’s Local Rule 78-320(c) and (h). For the reasons discussed below,  
24 this Court:

25 1. GRANTS Dr. Butler's F.R.Civ.P. 12(b)(1) motion to dismiss with leave to amend and

1 DISMISSES Ms. Wilkerson's complaint on grounds that it fails to allege grounds for this  
2 Court's subject matter jurisdiction;

3 2. GRANTS Dr. Butler's F.R.Civ.P. 12(f) motion to strike the complaint's second, third,  
4 fourth, fifth and sixth causes of action; and

5 3. ORDERS Ms. Wilkerson, no later than July 20, 2005, to file an amended complaint in  
6 compliance with this order.

7 **BACKGROUND**

8 On May 2, 2005, Ms. Wilkerson filed her complaint to allege in her medical malpractice (first)  
9 cause of action that Dr. Butler treated Ms. Wilkerson during March 2002 to February 2004 and  
10 negligently diagnosed her skin cancer as psoriasis. The complaint's willful medical omissions (second)  
11 cause of action alleges that on February 2, 2004, Dr. Butler performed a punch biopsy and that on  
12 February 4, 2004, Dr. Butler went to Ms. Wilkerson's place of work to give her pathology results for the  
13 biopsy but "made no record of such visit at her workplace or of the pathology results given to patient  
14 at all." The complaint's willful medical falsification (third) cause of action alleges that Dr. Butler  
15 "documented that diagnostic and Therapeutic plans, both new and continued were discussed in detail  
16 with The patient, and that all options were discussed" but that Dr. Butler did not perform items  
17 documented on Ms. Wilkerson's medical chart. The complaint alleges causes of action for negligent  
18 (fourth) and intentional (fifth) infliction of emotional distress arising from Dr. Butler's misdiagnosis.  
19 The complaint's punitive damages (sixth) cause of action alleges Dr. Butler's conduct was intentional,  
20 willful and malicious to entitle Ms. Wilkerson to punitive damages. The complaint's prayer seeks  
21 compensatory damages for medical costs and emotional distress damages.

22 \_\_\_\_\_On May 25, 2005, Dr. Butler filed his F.R.Civ.P. 12(b)(1) motion to dismiss the complaint for  
23 failure to allege this Court's subject matter jurisdiction and F.R.Civ.P. 12(f) motion to strike all but the  
24 complaint's medical malpractice (first) cause of action. Ms. Wilkerson failed to respond to Dr. Butler's  
25 motions.

26 **DISCUSSION**

27 **Lack Of Jurisdiction**

28 F.R.Civ.P. 8 establishes general pleading rules and provides in pertinent part:

(a) Claims for Relief. A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

• • •

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise and direct.

This Court's Local Rule 8-204 addresses allegations of jurisdiction and provides:

When an affirmative allegation of jurisdiction is required pursuant to Fed. R. Civ. P. 8(a)(1), it (I) shall appear as the first allegation of any complaint . . . , (ii) shall be styled "Jurisdiction," (iii) shall state the claimed statutory or other basis of federal jurisdiction, and (iv) shall state the facts supporting such jurisdictional claim.

11 Dr. Butler contends the complaint should be dismissed under F.R.Civ.P. 12(b)(1) which allows  
12 a motion to dismiss for lack of subject matter jurisdiction. Fundamentally, federal courts are courts of  
13 limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S.Ct. 341 (1994).  
14 Limits on federal jurisdiction must neither be disregarded nor evaded. *Owen Equipment & Erection Co.*  
15 v. *Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396 (1978). A plaintiff bears the burden to establish subject  
16 matter jurisdiction is proper. *Kokkonen*, 511 U.S. at 377, 98 S.Ct. 2396. This burden, at the pleading  
17 stage, must be met by pleading sufficient allegations to show a proper basis for the court to assert subject  
18 matter jurisdiction over an action. *McNutt v. General Motors Acceptance Corp.*, 298 U.S 178, 189, 56  
19 S.Ct. 780 (1936); F.R.Civ.P. 8(a)(1). When a defendant challenges jurisdiction “facially,” all material  
20 allegations in the complaint are assumed true, and the question for the court is whether the lack of  
21 federal jurisdiction appears from the face of the pleading. *Thornhill Publishing Co. v. General*  
22 *Telephone Electronics*, 594 F.2d 730, 733 (9<sup>th</sup> Cir. 1979); *Mortensen v. First Fed. Sav. & Loan Ass’n*,  
23 549 F.2d 884, 891 (3<sup>rd</sup> Cir. 1977); *Cervantez v. Sullivan*, 719 F.Supp. 899, 903 (E.D. Cal. 1989), *rev’d*  
24 *on other grounds*, 963 F.2d 229 (9<sup>th</sup> Cir. 1992).<sup>2</sup>

1 Dr. Butler correctly points out the complaint's absence of an allegation of this Court's subject  
2 matter jurisdiction. The complaint fails to comply with F.R.Civ.P. 8(a)(1) and this Court's Local Rule  
3 8-204 to warrant dismissal with leave to amend to attempt to allege grounds for this Court's subject  
4 matter jurisdiction.

5 This Court admonishes Ms. Wilkerson that this Court's Local Rule 15-220 requires an amended  
6 complaint to be complete in itself without reference to any prior pleading. As a general rule, an amended  
7 complaint supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9<sup>th</sup> Cir. 1967). After  
8 the filing of an amended complaint, the original pleadings serves no further function. Thus, Ms.  
9 Wilkerson is further admonished that in an amended complaint, each claim and involvement of each  
10 defendant must be sufficiently alleged.

11 **Striking Causes Of Action**

12 Dr. Butler seeks to strike the complaint's second through sixth causes of action on grounds they  
13 are redundant, immaterial, impertinent or scandalous. F.R.Civ.P. 12(f) empowers a Court to "order  
14 stricken from any pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Motions  
15 to strike may be granted if "it is clear that the matter to be stricken could have no possible bearing on  
16 the subject matter of the litigation." *LeDuc v. Kentucky Central Life Ins. Co.*, 814 F.Supp. 820, 830  
17 (N.D. Cal. 1992); *Colaprico v. Sun Microsystems, Inc.*, 758 F.Supp. 1335, 1339 (N.D. Cal. 1991).  
18 "[T]he function of a [F.R.Civ.P.] 12(f) motion to strike is to avoid the expenditure of time and money  
19 that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Sidney-*  
20 *Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9<sup>th</sup> Cir. 1983); *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524,  
21 1527 (9<sup>th</sup> Cir. 1993), *rev'd on other grounds*, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 114 S.Ct. 1023  
22 (1994).

23 A "redundant" matter consists of allegations that constitute a needless repetition of other  
24 averments or which are foreign to the issue to be denied. *Gilbert v. Eli Lilly & Co., Inc.*, 56 F.R.D. 116,  
25 120, n. 4 (D. P.R. 1972); *Manhattan Fire and Marine Ins. Co. v. Nassau Estates II*, 217 F.Supp. 196 (D.  
26 N.J. 1963). An "immaterial" matter has no essential or important relationship to the claim for relief or

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28 complaint and the Court did not review or rely on extrinsic evidence.

1 defenses pleaded. *Fantasy, Inc.*, 984 F.2d at 1527; *Gilbert*, 56 F.R.D. at 120, n. 5; *Fleischer v. A.A.P., Inc.*, 180 F.Supp. 717 (D. Pa. 1958). A statement of unnecessary particulars in connection with and descriptive of a material matter may be stricken as “immaterial.” *Gilbert*, 56 F.R.D. at 120, n. 5; *Burke v. Mesta Mach. Co.*, 5 F.R.D. 134 (D.C. Pa. 1946). Superfluous historical allegations are properly subject to a motion to strike. *Fantasy, Inc.*, 984 F.2d at 1527; see, e.g., *Healing v. Jones*, 174 F.Supp. 211, 220 (D. Az. 1959).

7 An “impertinent” allegation is neither responsive nor relevant to the issues involved in the action  
8 and which could not be put in issue or given in evidence between the parties. *Gilbert*, 56 F.R.D. at 120,  
9 n. 6; *Burke*, 5 F.R.D. 134. An “impertinent” matter consists of statements that do not pertain and are  
10 unnecessary to the issues in question. *Fantasy, Inc.*, 984 F.2d at 1527. A “scandalous” matter  
11 improperly casts a derogatory light on someone, usually a party. *Skadegaard v. Farrell*, 578 F.Supp.  
12 1209, 1221 (D. N.J. 1984); *Gilbert*, 56 F.R.D. at 120, n. 7; *Martin v. Hunt*, 28 F.R.D. 35 (D. Mass.  
13 1961). Allegations may be stricken as scandalous if the matter bears no possible relation to the  
14 controversy or may cause the objecting party prejudice. *Talbot v. Robert Mathews Distributing Co.*, 961  
15 F.2d 654, 664 (7<sup>th</sup> Cir. 1992); see *Beck v. Cantor, Fitzgerald & Co.*, 621 F.Supp. 1547, 1565 (N.D. Ill.  
16 1985).

17 Dr. Butler contends there is no claim for willful medical omissions to support the complaint’s  
18 second cause of action. Dr. Butler further complains the cause of action refers to Exhibits C and D  
19 which are not attached to the complaint and have not been provided to defense counsel despite requests  
20 for them.

21 The gist of plaintiff’s willful medical omissions (second) cause of action this at that Dr. Butler  
22 acted unprofessionally by giving plaintiff her biopsy results at her place of work. Since Ms. Wilkerson  
23 sues Dr. Butler for malpractice arising from misdiagnosis, issues regarding his visit to her place of  
24 employment are immaterial to warrant striking the willful medical omissions (second) cause of action.

25 Dr. Butler contends that he cannot discern the substance of the willful medical falsification  
26 (third) cause of action. Dr. Butler further notes that the complaint reflects no harm in connection with  
27 the matters subject to the cause of action.

28 A pleading may not simply allege a wrong has been committed and demand relief. The

1 underlying requirement is that a pleading give “fair notice” of the claim being asserted and the “grounds  
 2 upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 103 (1957); *Yamaguchi v.*  
 3 *United States Dept. of Air Force*, 109 F.3d 1475, 1481 (9<sup>th</sup> Cir. 1997). Although a complaint need not  
 4 outline all elements of a claim, “[i]t must be possible . . . for an inference to be drawn that these elements  
 5 exist.” *Walker v. South Cent. Bell Telephone Co.*, 904 F.2d 275, 277 (5<sup>th</sup> Cir. 1990); *Lewis v. ACB*  
 6 *Business Service, Inc.*, 135 F.3d 389, 405-406 (6<sup>th</sup> Cir. 1998). Despite the flexible pleading policy of  
 7 the Federal Rules of Civil Procedure, a complaint must give fair notice and state the elements of the  
 8 claim plainly and succinctly. *Jones v. Community Redev. Agency*, 733 F.2d 646, 649 (9<sup>th</sup> Cir. 1984).  
 9 A plaintiff must allege with at least some degree of particularity overt facts which defendant engaged  
 10 in to support plaintiff’s claim. *Jones*, 733 F.2d at 649.

11 The willful medical falsification (third) cause of action appears to challenge Dr. Butler’s  
 12 documentation of treatment. The cause of action is unclear and fails to give Dr. Butler fair notice of a  
 13 claim and its supporting grounds. In absence of a connection to Ms. Wilkerson’s misdiagnosis claim,  
 14 the cause of action is unnecessary to the issues in question to warrant striking the cause of action.

15 According to Dr. Butler, the complaint’s negligent infliction of emotional distress (fourth) cause  
 16 of action is indistinguishable from her medical malpractice (first) cause of action in that emotional  
 17 distress damages are subject to the medical malpractice cause of action.

18 Negligent infliction of emotional distress is simply a species of negligence. *Wooden v. Raveling*,  
 19 61 Cal.App.4th 1035, 1046, 71 Cal.Rptr.2d 891, 989 (1998) (citing numerous cases). “[T]he negligent  
 20 causing of emotional distress is not an independent tort but the tort of negligence . . .” 6 Witkin,  
 21 Summary of Cal. Law (9<sup>th</sup> ed. 1988) Torts, § 838, p. 195). “Damages for severe emotional distress,  
 22 rather, are recoverable in a negligence action when they result from the breach of a duty owed the  
 23 plaintiff that is assumed by the defendant or imposed on the defendant was a matter of law, or that arises  
 24 out a relationship between the two.” *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*, 48 Cal.3d  
 25 583, 591, 257 Cal.Rptr. 98, 103 (1989). Since damages for severe emotional distress are recoverable  
 26 under the complaint’s medical malpractice (first) cause of action as part of that negligence claim, the  
 27 negligent infliction of emotional distress (fourth) cause of action offers nothing new and is redundant  
 28 to warrant striking it.

1       Dr. Butler argues that the intentional infliction of emotional distress (fifth) cause of action fails  
2 to state anything beyond the medical malpractice (first) cause of action. According to Dr. Butler, the  
3 intentional infliction of emotional distress (fifth) cause of action fails to allege Dr. Butler's misdiagnosis  
4 "was sufficiently outrageous to state a cause of action for intentional infliction of emotional distress."

5       The elements of an intentional infliction of emotional distress cause of action are: (1) defendant's  
6 outrageous conduct; (2) defendant's intention to cause, or reckless disregard of the probability of  
7 causing, emotional distress; (3) severe emotional distress; and (4) an actual and proximate causal link  
8 between the tortious conduct and the emotional distress. *Cole v. Fair Oaks Fire Protection Dist.*, 43  
9 Cal.3d 148, 155, n. 7, 233 Cal.Rptr. 308 (1987); *Nally v. Grace Community Church of the Valley*, 47  
10 Cal.3d 278, 300, 253 Cal.Rptr. 97, 110 (1988), *cert. denied*, 490 U.S. 1007, 109 S.Ct. 1644 (1989). The  
11 "[c]onduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a  
12 civilized community." *Davidson v. City of Westminister*, 32 Cal.3d 197, 209, 185 Cal.Rptr. 252 (1982)  
13 (quoting *Cervantez v. J.C. Penney Co.*, 24 Cal.3d 579, 593, 156 Cal.Rptr. 198 (1979)). Conduct is  
14 extreme and outrageous when it is of a nature which is especially calculated to cause, and does cause,  
15 mental distress. Liability does not extend to mere insults, indignities, threats, annoyances, petty  
16 oppressions, or other trivialities. *Fisher*, 214 Cal.App.3d at 617, 262 Cal.Rptr. at 857.

17       While the outrageousness of a defendant's conduct normally presents an issue of fact to be  
18 determined by the trier of fact, the court may determine in the first instance whether the defendant's  
19 conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. *Trerice v. Blue*  
20 *Cross of California*, 209 Cal.App.3d 878, 883, 257 Cal.Rptr. 338, 340 (1989); *Fowler v. Varian*  
21 *Associates, Inc.*, 196 Cal.App.3d 34, 44, 241 Cal.Rptr. 539 (1989).

22       The intentional infliction of emotional distress (fifth) cause of action merely alleges that Dr.  
23 Butler knew or should have known that his misdiagnosis would cause Ms. Wilkerson distress. The  
24 cause of cation lacks allegations of essential elements of an intentional infliction of emotional distress  
25 cause of action. The cause of action adds nothing new and merely asserts claims incorporated into the  
26 medical malpractice (first) cause of action to warrant striking it.

27       Dr. Butler contends that the punitive damages (sixth) cause of action does not state a claim and  
28 should appear in the complaint's prayer. Dr. Butler is correct in that the gist of the punitive damages

1 (sixth) cause of action is that Dr. Butler knew his diagnosis of psoriasis would put plaintiff in the sun.  
2 A motion to strike is appropriate to address requested relief, such as punitive damages, which is not  
3 recoverable as a matter of law. 2 Schwarzer, Tashima & Wagstaffe, *Cal. Practice Guide: Fed. Civil*  
4 *Procedure Before Trial* (2005) Attacking the Pleadings, para. 9-389 and 9-390, p. 9-97. The punitive  
5 damages (sixth) cause of action adds nothing further to the medical malpractice (first) cause of action  
6 to warrant striking it.

7 **CONCLUSION AND ORDER**

8 For the reasons discussed above, this Court:

- 9 1. GRANTS Dr. Butler's F.R.Civ.P. 12(b)(1) motion to dismiss with leave to amend and  
10 DISMISSES Ms. Wilkerson's complaint on grounds that it fails to allege grounds for this  
11 Court's subject matter jurisdiction;
- 12 2. GRANTS Dr. Butler's F.R.Civ.P. 12(f) motion to strike the complaint's willful medical  
13 omissions (second), willful medical falsification (third), negligent infliction of emotional  
14 distress (fourth), intentional infliction of emotional distress (fifth), and punitive damages  
15 (sixth) causes of action; and
- 16 3. ORDERS Ms. Wilkerson, no later than July 20, 2005, to file an amended complaint in  
17 compliance with this order.

18 IT IS SO ORDERED.

19 **Dated: June 30, 2005**  
20 66h44d

21 **/s/ Lawrence J. O'Neill**  
22 UNITED STATES MAGISTRATE JUDGE  
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